SUPREME COURT, U.S.

NOV 10 1952

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 53

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

On October 13, 1952, this Court entered the following order herein:

> "The petition for writ of certiorari is granted limited to Question No. 2 presented by the petition for the writ and the case is transferred to the Summary Docket."

THE ISSUE PRESENTED

The sole issue presented to the Court as limited by the foregoing order is:

> "2. Whether the demand and insistence of the International Typographical Union that publishers pay employees in their composing rooms for setting 'bogus' violated Section 8(b)(6) of the National Labor Relations Act in view of the fact that composing room employees perform no service incident or essential to the production of a newspaper in their handling of such 'bogused' material" (Question No. 2 presented by the petition for the writ of certiorari.)

PRELIMINARY STATEMENT

On the same day that the Court granted the petition herein, under the limitation as to its scope, it granted the petition of the National Labor Relations Board in *National Labor Relations Board* v. *Gamble Enterprises, Inc.*, No. 238, October Term, 1952.

Subsequently the two cases, No. 53 and No. 238, were calendared for hearing on the same day and Counsel were instructed to appear in this Court on November 19 for argument. For the convenience of the parties and for the convenience of the Court, it was agreed between counsel for the petitioner and the respondent in No. 53 and between counsel for the petitioner and the respondent in No. 238 to exchange briefs and file their briefs in this Court on November 10 and further should any party desire to file a reply brief that such brief should be handed to the other party and filed in this Court on or before November 15.

In the interest of brevity the statement of jurisdiction (including the single issue involved), the statement of the case, the summary of argument and the argument as they appear in petitioner's brief in No. 53 are incorporated herein by reference and adopted for the purpose of this reply brief.

STATUTE INVOLVED

The statute involved in this reply is the National Labor Relations Act as Amended (61 Stat. 136, 29 U. S. C. Supp. IV, § 151 et seq.) the pertinent provisions of which read as follow:[1]

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
>
> "(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

DIFFERENCE BETWEEN CASE NO. 53 AND CASE NO. 238

In its brief, pp. 35 to 39 inclusive, in No. 238 the respondent, Gamble Enterprises, Inc., attempts to make an analysis of *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782 (C.A. 7, 1952) for the ostensible purpose of showing that the two cases are basically different in their circumstances and issues.

It is essential, therefore, in this reply brief to discuss the comment of the respondent *Gamble Enterprises, Inc.* in No. 238 in its brief in so far as that comment relates to this case. That will be done following the reply made to the

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[1] While consideration in the original brief was confined to Section 8(b)(6), because of the nature of respondent's argument herein consideration must be given to another sub-section, namely Section 8(b)(2).

arguments advanced by the National Labor Relations Board in this case.

SUMMARY OF REPLY ARGUMENT IN NO. 53

The Board in its presentation of the question presented in this case has placed itself in hopeless conflict between its interpretation and construction of the meaning of Section 8(b)(6) and its interpretation and construction of the meaning of Section 8(b)(2) of the Act. Its contention herein is contrary to many of its orders in cases arising under Section 8(b)(2) and in conflict with the settled jurisprudence of this land on the meaning of the words "to cause or attempt to cause" as those words are used both in Section 8(b)(2) and in Section 8(b)(6).

To uphold respondent's contention in this case, this Court would have to give different meaning to the words "to cause or attempt to cause" as used in Section 8(b)(6) from the identical words "to cause or attempt to cause" as used in Section 8(b)(2).

ARGUMENT

I.

The Board in its presentation of the question presented in this case has placed itself in hopeless conflict between its interpretation and construction of the meaning of Section 8(b)(6) and its interpretation and construction of the meaning of Section 8(b)(2) of the Act. Its contention herein is contrary to many of its orders in cases arising under Section 8(b)(2) and in conflict with the settled jurisprudence of this land on the meaning of the words "to cause or attempt to cause" as those words are used in Section 8(b)(2) and in Section 8(b)(6).

In its statement of the question presented the Board in its brief, pages 2 and 3, said:

"(a) Whether the fact that printers actually perform the work necessary for the reproduction of advertising matter takes the practice outside the category of 'services which are not performed' within the meaning of the Section;

"(b) Whether the fact that the reproduction clause appears as a part of the over-all settlement of the wages, hours, and working conditions of the printers takes the practice outside the meaning of the phrase, 'in the nature of an exaction,' under the Section; and

"(c) Whether the fact that the reproduction practice is incorporated in the collective bargaining agreement as the result of normal collective bargaining sessions without any evidence in the record of any need on the part of the union to threaten or to exert strike or like pressure is sufficient to hold that the union has not 'cause[d] or attempt[ed] to cause [payment] in the nature of an exaction' within the meaning of Section 8(b)(6)."

It is unnecessary herein to discuss (a) as that matter was fully covered under Point I in petitioner's original brief herein. When we come to the Board's discussion of (b), however, we find that it has placed itself in hopeless conflict betwe its interpretation and construction of the meaning of the words "to cause or attempt to cause" as those words are used in Section 8(b)(2) of the Act and its contention here as to the meaning of the words "to cause or attempt to cause" as those words are used in Section 8(b)(6) of the Act.

The Board has held in numerous cases that the mere attempt of a labor organization to cause an employer to discriminate against an employee in violation of sub-section (a)(3) of the Act or with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership violates Section 8(b)(2). In these cases the Board has held, and the Courts

have upheld it, that there is a violation even though there has been no showing that particular employees or applicants were the actual or intended objects of the discriminatory scheme. *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686 (C.A. 2) wherein the Court said in approving the order of the Board:

> "* * * we see no rational basis for respondent's argument that Section 8(b)(2) does not make it an 'unfair labor practice' to attempt to cause an employer to discriminate against a group of employees or potential employees but only against some specified employees or potential employees."

See also *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392 (C.A., D.C.) cert. den. 340 U.S. 934, 71 S. Ct. 499, 95 L. ed. 674, and also see *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, wherein the lower court in the instant case said:

> "We likewise agree that the use in this sub-section of the words 'an employee' does not require such a narrow interpretation as would limit the application of the sub-section to those cases where a particular employee or employees are involved."

citing with approval *United Mine Workers* v. *National Labor Relations Board, supra.*

Thus in so far as the words "to cause or attempt to cause" are concerned we find that the Board and the courts in cases arising under Section 8(b)(2) have recognized that they embrace two separate and distinct violations, even though a party charged with violation of the Act has been charged with both. Also, the Board and the courts in Section 8(b)(2) cases have attributed to the words "to cause or attempt to cause" their well known meaning as determined in other fields,—as for illustration the criminal field. In that field the attempt to commit an offense is a separate and distinct crime from the offense itself if the crime be not accomplished. But both the attempt and the

accomplished crime are offenses.[2] For the meaning of the words "to cause or attempt to cause" see *State* v. *Cass*, 264 D. 7, 8, 146 Wash. 585; *State* v. *Harwich*, 63 So. 166, 167, 133 La. 545; *Tharp* v. *State*, 122 So. 698, 23 Ala. App. 193.

As was said in the *Tharp* case, an "attempt" is an attempt to commit an act which in itself is an offense, coupled with an overt act which falls short of the accomplishment of the thing intended.

What does the record in this case show as to the Board's construction of the words "to cause or attempt to cause" an employer to discriminate against employees in violation of Section 8(b)(2) of the Act?

The Board issued a complaint against the ITU charging it with a violation. The complaint was based not only upon the ITU's revised bargaining policy as adopted at its 1947 convention to avoid the impact of the various provisions of the Act on its traditional practices and policies but upon the acts of the ITU to carry out that policy. Yet the record was devoid of evidence as to discrimination against any specified individual or individuals.

While the proceedings were pending before the Board, the ITU was enjoined because of its continuing attempts to violate Section 8(b)(2) through imposing upon publishers the traditional closed shop conditions imbedded in its Book of Laws and ordered continued by its 1947 convention policy. *Evans* v. *International Typographical Union*, 76 F. Supp. 881.

The ITU flaunted the injunction whereupon it was cited to show cause why it should not be held in contempt and it was held in contempt. *Evans* v. *International Typographical Union*, 81 F. Supp. 675.

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[2] See D.C. Code (1951) Title 22, Section 103, as to attempts and also Sections 2901 and 2902 as to robbery and attempts to commit robbery and other sections of the same title dealing both with attempts to commit a crime and the crime itself.

Subsequently, after consideration of the record, the Board issued an order under the provisions of Section 8(b)(2) directing the ITU to cease and desist from its efforts "to cause or attempt to cause" employers to discriminate against employees.

The ITU still did not change its policy and the Board sought and obtained an order from the Court of Appeals for the Seventh Circuit enforcing that order. *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782.

The ITU petitioned this Court to review the enforcement order issued by the court below and on October 13, 1952, this Court denied certiorari. *International Typographical Union* v. *National Labor Relations Board*, No. 56, October Term, 1952.

Thus in its proceeding against the ITU under Section 8(b)(2) of the Act, the Board gave to the words "to cause or attempt to cause" their historic legal meaning and the courts in three different proceedings to date have approved the Board's action.

The identical words "to cause or attempt to cause" are used in section 8(b)(6). Yet, in its construction of that section, the Board in this case seeks to give the words a different meaning on the amazing theory that the accomplishment of the effort by the ITU to cause employers to pay money for services which are not performed or not to be performed was not a violation of the Act because those to whom the money was paid went through the motions of performing a manual operation in the employers' plants. It was on this ground that the court below upheld the Board in its order dismissing the charge of violation of Section 8(b)(6).

Would it not be absurd to acquit a burglar because in the course of his burglary he was forced to unlock a safe or break down doors or go through some other manual operation in order to get his loot?

Is it not equally absurd for the Board and the court below to hold that because upon ITU insistence its members perform certain manual operations in order to exact money for services they do not perform, the ITU is not guilty of a violation of Section 8(b)(6)?

Under (b) in its statement of the question presented and in its argument the Board seeks to take the reproduction clause out of the prohibition of Section 8(b)(6) on the theory that if it is agreed to "as a part of the over-all settlement of the wages, hours and working conditions" it, therefore, cannot be in the nature of an exaction.

While we discussed the meaning of the word "exaction" in our original brief, it is essential here to point out how fallacious this argument of the Board is and for the following reasons:

The demand for "bogus" was one of the traditional policies and practices of the ITU hit by the Section 8(b)(6) amendment to the Act in 1947.

The Board found that in the setting of "bogus" no services in the legal sense are performed. The record is undisputed that no publisher could obtain a contract unless he agreed to "bogus." Under ITU law and ITU policy as enforced, the matter of reproduction could not even be made the subject of bargaining (R. 1421, 1986, 2020).

The root of the evil is to be found in Article IX, Section 2 of the General Laws of ITU (R. 1994) which prohibits the use of mats unless they are reproduced. Local unions are required by Article III, Section 2, to adhere to the General Laws (R. 1986). A local union cannot even submit a proposal to a publisher unless it has first been approved by the International President (Article III, Section 4 of the General Laws, R. 1986). The International President flatly testified he would not approve a contract that exempted reproduction (R. 1250). And further that since 1944, the ITU "has insisted on a specific clause specifically including (recognition by publishers) the ITU laws in every contract." (R. 1243).

Thus from the record it is obvious that any settlement reached by an employer with this union around the bargaining table since 1944 has been a settlement forced by the unalterable demand of the ITU for unqualified recognition of its traditional policies and practices as imbedded in its Book of Laws and, since 1947, in its program adopted to evade and avoid the amendments to the Act. Therefore the Board's contention that a settlement reached at the bargaining table providing for ITU members to perform the manual operation of reproduction takes the practice outside the category of an "exaction" is without foundation in fact. It could just as well be argued that because the victim of a burglary, at the command of the burglar and in order to save his life, handed over his possessions to the intruder, there was no burglary.

Under (c) in the statement of the question presented and in its argument, the respondent poses this question:

> "(c) Whether the fact that the reproduction practice is incorporated in the collective bargaining agreement as the result of normal collective bargaining sessions without any evidence in the record of any need on the part of the union to threaten or to exert strike or like pressure is sufficient to hold that the union has not 'cause[d] or attempt[ed] to cause' [payment] in the nature of an exaction' within the meaning of Section 8(b)(6)."

This query can be disposed of simply by pointing out, that both prior to and since the enactment of the 1947 amendments there have not been "normal collective bargaining sessions" between the ITU and employers.

They have not been normal because of the insistence and demand of the ITU for complete observance of its traditional policies and practices—including reproduction—as those policies and practices are set forth in its Book of Laws. Sufficient reference has already been made to the coercive measures used to accomplish the union's ends. There was and there has been no bargaining on any matters

required by ITU laws. Employers were given the alternative of complying with them or taking a strike. The record is undisputed on this.

II.

To uphold respondent's contention in this case, this Court would have to give different meaning to the words "to cause or attempt to cause" as used in Section 8(b)(6) from the identical words "to cause or attempt to cause" as used in Section 8(b)(2).

On the undisputed record in this case, for this Court to uphold respondent's contention that the requirement of the ITU that all publishers agree to its "bogus" demands does not violate Section 8(b)(6) would require the giving of a different legal meaning to the words "to cause or attempt to cause" as used in Section 8(b)(6) from the meaning heretofore given by the courts to the identical words "to cause or attempt to cause" as used in Section 8(b)(2). Such a thing is inconceivable. It is fallacious to argue, as the Board does, that the reproduction practice is incorporated in the collective bargaining agreements as the result of "normal collective bargaining sessions" without any evidence of coercion on the part of the union.

By the same type of reasoning it uses herein, the Board, and the Courts also, very well could have decided both the *National Maritime Union* and the *United Mine Workers* cases, *supra*, differently. As the Board itself pointed out to the court below in seeking enforcement of its orders in Case No. 56, this term, wherein certiorari was denied, the *National Maritime Union* case arose upon a set of facts where the union had insisted upon a hiring provision in its contract which, on its face, did not require employers to discriminate but which in its operative effect had in the past required discrimination and which the parties contemplated would continue to require discrimination. In the *Mine Workers* case, *supra*, the union without complying

with prescribed statutory authorization procedures attempted to cause, and in that case actually caused, the companies to execute an agreement containing an invalid union shop provision and thus to discriminate against employees within the meaning of Section 8(a)(3) of the Act and in violation of Section 8(b)(2) of the Act.

In the case herein it is undisputed that the very purpose of the bargaining policy adopted at the ITU convention in 1947 was to enable that union to operate outside the law, and in defiance of the law just as the United Mine Workers attempted to do in respect of its union shop agreement. That the ITU succeeded in its efforts was demonstrated in the injunction proceeding held in the United States District Court for the Southern District of Indiana, *Evans* v. *International Typographical Union, supra*, and in the contempt proceedings in the same Court arising out of the ITU's violation of the decree, 81 F. Supp. 675, *supra*. That the policy was successful is further demonstrated by the finding that up to the time of the injunction hearing in March, 1948, 682 scales (i.e. agreements) within ITU policy had been put into effect, of which 368 were in the newspaper and 314 in the commercial field. *American Newspaper Publishers Association* v. *National Labor Relations Board*, supra, at 193 F. 2d 795.

Reduced to its barest essentials the Board's argument in this case sums up to this: that if a practice prohibited by the statute is agreed to in the course of collective bargaining, it becomes lawful. This is contrary to holdings of this Court in two types of cases, one where an illegal clause vitiates the whole contract; *Trist* v. *Child*, 88 U. S. 441; *Hanauer* v. *Doane*, 79 U. S. 342; and the other where the illegal clause is found to be separable and therefore nullified but the rest of the contract permitted to stand. *Gelpcke* v. *City of Dubuque*, 68 U. S. 221 and *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 64.

The record herein shows the nature of the pressure and the coercion exerted by the union to accomplish its ends

and demonstrates that such bargaining sessions as have been held since August, 1947, have not been "normal collective bargaining sessions."

On the record in this case, one of the essentials of the ITU's bargaining policy, one of its unalterable requirements is that publishers agree to its reproduction or "bogus" tradition and pay for services not performed or not to be performed.

It is clear therefore that the union not only has attempted to cause but has caused payments in the nature of an exaction in violation of Section 8(b)(6). To hold otherwise would give to the words "to cause or attempt to cause" as used in that section a meaning different from the judicially determined meaning of the identical words as used in Section 8(b)(2) in proceedings heretofore brought and concluded under Section 8(b)(2).

COMMENT ON COMPANION CASE NO. 238

While there are factual differences in the records in the two cases, No. 53 and No. 238, presently before this Court, it is our contention that while the Sixth Circuit was correct in its holding in the *Gamble* case, the facts of the *American Newspaper Publishers Association* case are equally strong, if not stronger, in showing a violation of the Act.

One of the differences between the two cases is that in the *Gamble* case the employer did not yield to the attempt of the union to cause him to pay money in the nature of an exaction for services not performed or not to be performed, whereas in the instant case the facts of the record are that hundreds of employers were required to yield to the unalterable demands of the ITU and to pay money in the nature of an exaction for services not performed or not to be performed. The fact that the ITU had been successful in its demands for many years prior to 1947 does not change the case.

Thus, in the *Gamble* case we have a violation incident to the attempt of the union to cause the employer to pay money in the nature of an exaction for services not performed or not to be performed. That attempt failed of its purpose even though, as a result of the union's coercive measures, the employer found himself deprived of the right to use name bands in the conduct of his theatrical business.

A further distinction between the *Gamble* case and the instant case is that in the former the union attempted to procure employment for its members whereby it claimed service would be rendered to the employer, viz. the union sought to have its members actually play during a performance and for the pleasure of the audience. In the instant case, however, there is not even the "mere assertion of the union that it desires to perform" services to the employer. In fact, the record is undisputed that in the statutory sense services were not even contemplated by the union. (R. 293)

The order of the Sixth Circuit Court in the *Gamble* case was based on the attempt of the union "to cause" the employer to pay money for services not performed or not to be performed and which the employer did not need, did not want and was unwilling to accept.

The court disposed of the contention of the Board, reiterated here, that the union was justified in this attempt because of its desire to have its members perform, in this language:

> "By the Board's order, the provisions of § 8(b)(6) may be completely nullified by the mere assertion of the union that it desires to perform. The Board reasoned that this was precisely the object of the section and speculated that the union had modified its earlier policy in order to avoid its violation. We are unable, however, to ascribe to Congress a purpose to condemn certain practices in labor relations and at the same time to use a form of expression that permits escape from its condemnation." 196 F. 2d at 63.

In this case the union not only attempted "to cause" but did—and continues to—"cause" employers to pay money in the nature of an exaction for services not performed and not to be performed.

So, the distinction between the two cases,—the *Gamble* case and this,—is that in the *Gamble* case the union fell short of its objective of causing the payment whereas in this case the union has achieved its objective as to all employers without exception with whom it has entered into contracts or agreements, written or oral.

There is no question in this case in respect of the proper determination of the number of employees required to perform services in the legal sense of "services." The record is undisputed that there is a nation wide shortage of competent printers—not enough to perform essential services within the five day week period fixed by ITU laws. (Article XI of the General Laws; R. 1710-1711, 1341, 1346). There is no question of obtaining work for ITU members.

The only question is whether Section 8(b)(6) was violated by the enforced demands of the ITU that employers pay money in the nature of an exaction for services not performed or not to be performed.

CONCLUSION

It is respectfully submitted, as shown herein and in ot
original brief, that the decision of the court below shoul
be reversed.

Respectfully submitted,

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